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IN THE

Supreme Court of the United States

October Term, 1961.

No. 344.

RADIO CORPORATION OF AMERICA,
Petitioner,

v.

ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL CAMDEN AREA CHAPTER; and CHARLES M. BRINDLEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL CAMDEN AREA CHAPTER; AND CHARLES M. BRINDLEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Radio Corporation of America petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 25, 1961.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey (R. 150a-176a) [1] is unreported. The opinion of the Court of Appeals (App., *infra*, pp. 1a-10a) is reported at 291 F. 2d 105.

JURISDICTION.

The judgment of the Court of Appeals (App., *infra*, p. 11a) was entered on May 25, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

1. Record references herein are to the Joint Appendix in the court below.

QUESTION PRESENTED.

Whether a court of appeals can ignore the intent of the parties to a collective bargaining agreement as evidenced by the provisions of the agreement, the bargaining process which gave rise to the language contained in those provisions, and the long-continuing understanding of the parties to the agreement, and order arbitration of a "grievance", merely because the court concludes, by a speculative and legalistic analysis of the contractual language, that the arbitration provisions of the agreement do not, on their face, necessarily exclude the "grievance" from arbitration.

STATUTES AND CONTRACT PROVISIONS INVOLVED.

1. Section 301(a) of the Labor Management Relations Act (Act of June 23, 1947, 61 Stat. 156), 29 U. S. C. § 185(a), provides in pertinent part:

> "Suits for violation of contracts between an employer and a labor organization * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

2. The Declaratory Judgments Act (Act of June 25, 1948, ch. 646, 62 Stat. 964), as amended, 28 U. S. C. § 2201, provides in pertinent part:

> "In a case of actual controversy within its jurisdiction, * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

3. Relevant provisions of the collective bargaining agreement (R. 137a-149a) are set forth at appropriate places in the body of this petition.

STATEMENT.

This case raises a question as to the extent to which district courts, in determining whether an asserted "grievance" is arbitrable under a collective bargaining agreement, must recognize and enforce the intent of the parties to the contract, as evidenced by the provisions of the contract, the bargaining process which led to the selection of the language contained in those provisions, and the long-continuing understanding of the parties. The record in this case clearly establishes that the parties understood that a "grievance" of the type here involved was not arbitrable. The court below, in ordering arbitration, felt constrained by its reading of recent decisions of this Court to ignore this clear record.

Since 1946 (R. 70a), the terms and conditions of employment of RCA's engineering personnel have been the subject of a series of collective bargaining agreements (R. 71a-75a) between RCA and the Association of Professional Engineering Personnel (hereinafter called the Association). The collective bargaining agreement here involved was in effect between December 14, 1956, and July 1, 1958 (R. 5a, 12a). On April 17, 1958, the Association presented a written "grievance" to RCA which stated (R. 36a-37a):

> "The Association grieves for the following reasons: Under the Agreement, the Company is obligated to review, periodically, the performance of employees for the purpose of determining whether the particular employee is entitled to a merit increase. Under the Agreement and by established practice, the Company has become obligated to grant a level of increases which, for the group as a whole, is consistent with the level granted in prior years and has also become obligated to base the level of increase for any individual employee upon his level of performance. The Company has now violated the Agreement and these established practices by reducing the general level of merit in-

creases and by basing individual increases upon factors other than the level of performance. The Company is requested to review the merit increases records for all employees starting with September, 1957, and to revise their decisions as to individual merit increases so as to bring the average level of merit increases granted up to the average existing prior to that date."

In reply, RCA pointed out, *inter alia,* that the amounts of merit increases granted to eligible employees were not arbitrable under the collective bargaining agreement (R. 8a, 37a). The Association then sought to invoke the arbitration procedure of the collective bargaining agreement (R. 9a).

1. *The Complaint and Counterclaim.* On July 10, 1958, RCA filed a complaint in the district court, to restrain the Association from proceeding with the attempted arbitration and to obtain a ruling that the "grievance" was not arbitrable (R. 1a, 4a-10a). Jurisdiction was predicated on Section 301 of the Labor Management Relations Act, *supra,* p. 2, and the Declaratory Judgments Act, *supra,* p. 2. At the suggestion of the district court (R. 33a),[2] the Association, on March 11, 1959 (R. 2a), filed a counterclaim by which it sought an order compelling RCA to arbitrate the "grievance" (R. 35a-37a).[3]

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2. The district court made this suggestion at the conclusion of an opinion (R. 27a-33a) in which it held that RCA was entitled to an injunction restraining the Association from proceeding with arbitration pending final determination of the matter by that court. The American Arbitration Association had initially informed counsel for both parties that it was suspending proceedings pending a district court decision (R. 18a, 20a-21a). However, the Arbitration Association thereafter reversed its position and stated an intention to proceed with the arbitration (R. 18a, 22a-23a). To meet this situation, RCA filed its motion for injunctive protection (R. 16a-17a).

3. No question of federal jurisdiction was raised by the parties or the district court (R. 4a-5a, 12a, 63a, 150a, 173a). However, on its own motion, the court below noted in its opinion a

2. *The Collective Bargaining Provisions.* The provisions of the collective bargaining agreement of December 14, 1956 are set forth at length in the Joint Appendix (R. 137a-149a).

a. Paragraph 1.01(c) defines "grievance" as:

> "* * * disputes or differences between the Company and the Association, or employees represented by it, with respect to the interpretation or application of any provision of this Agreement."

b. Article 5 contains general salary provisions. Paragraph 5.01 provides that RCA shall determine the duties of all occupational classifications. Paragraph 5.02 provides, *inter alia,* for three general salary increases of 3% each, effective January 1, 1957, June 16, 1957, and January 1, 1958. The same paragraph incorporates rate schedules, which fix minimum and maximum salary rates for occupational classifications, and provides that an employee whose salary rate, after the increases, is below the minimum for his occupation, would progress to the minimum "* * * in accordance with such merit increases as may be granted to him."

Paragraph 5.07 deals with merit increases. It contains an undertaking that RCA will review the performance of employees, and fixes a schedule of merit increase eligibility dates for the different occupations. It provides that each employee shall be informed and shall receive a written notice, on the designated eligibility date, of his "status

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jurisdictional question, namely, whether RCA's action for a declaratory judgment was a suit "* * * for violation * * *" of a labor contract. The court concluded that "* * * the more reasonable reading * * *" of Section 301(a) of the Labor Management Relations Act included a proceeding to determine by declaration whether a refusal to arbitrate violated a labor contract (App., *infra,* p. 3a). In addition to the decisions referred to in the opinion below, see **Weyerhaeuser Co. v. International Brotherhood,** 190 F. Supp. 196 (D. S. D. Maine, 1960).

of eligibility." After further provisions dealing with eligibility dates, including a special provision that employees who are advised that they are not eligible will be given a shortened period for their next review, Paragraph 5.07 concludes:

> "Any disagreement by the Association with the decision of management as to the employee's eligibility for a merit increase under this paragraph is subject to the grievance procedure. * * *"

c. Article 8 covers the grievance procedure. The first step is discussion and decision by a location grievance board which has authority to handle (1) "all properly submitted grievances" and (2) other matters agreed upon, with the proviso that "such agreement shall not extend the scope of arbitration."

In the event of default in decision or an unacceptable decision, the party presenting the grievance may submit it to arbitration. Detailed provisions as to written demand and the selection of arbitrators from a list furnished by the American Arbitration Association are set forth. The arbitrator's decision is to be final and binding, but the scope of arbitration is limited by Paragraph 8.04 which provides:

> "* * * The authority of the Arbitrator shall be limited to determining questions involving the interpretation or application of the terms of this Agreement or the applicable Area Agreement. He shall have no authority to add to, subtract from, or to change any of the terms of this Agreement or any Area Agreement, to change an existing wage rate or to establish a new wage rate. * * *"

3. *The Trial.* On April 18 and April 19, 1960 (R. 3a), the case came on for trial in the district court.[4] The evi-

4. This case was tried together with Civil Action No. 112-60, which involved the question of merit increase arbitrability under the collective bargaining agreement in effect from July

dence established the following with respect to the basic question of arbitrability of the Association's "grievance."

The merit increase paragraph of the contract between the Association and RCA had been a specific object of bargaining in the negotiation of each successive agreement between the parties. Repeated revisions had been made in connection with matters such as the written notice requirement and the frequency of the scheduled examination dates (R. 72a, 79a, 80a, 82a, 83a). However, there had been no change since 1947 in the language (Paragraph 5.07 of the 1956 agreement) which limits the availability of arbitration in connection with the merit increase program to questions of an "* * * employee's eligibility for a merit increase * * *" (R. 73a).

The language of the exclusion clause of the arbitration provisions (Paragraph 8.04 of the 1956 agreement, *supra* p. 6) was placed in the collective bargaining agreement for the first time in the November 1947 contract (R. 74a). It has appeared without change,[5] in all subsequent contracts (R. 74a-75a).

In negotiating the July 1954 collective bargaining agreement, the Association proposed the following changes with respect to the merit increase paragraph (Paragraph 5.07 of the 1956 agreement) (R. 78a-79a):

1. The addition of the following sub-paragraph:

> "Each employee shall be informed in writing within one month after the designated review date, [sic.] status of eligibility for merit increase. **If not so in-**

1959 to July 1960. A decision adverse to the Association was not appealed. **Association of Professional Engineering Personnel v. Radio Corporation of America,** 183 F. Supp. 834 (D. N. J. May 5, 1960).

5. The one addition to the language of the 1947 clause is of no significance here. The provision has been made applicable to "Area Agreements."

formed the employee shall automatically receive a 20 per cent increase." [6]

2. The addition in the grievance procedure sub-paragraph of the words "or the amount received" after the words "under this paragraph." Under this proposal the sub-paragraph would have read:

> "Any disagreement by the Association with the decision of management as to the employee's eligibility for a merit increase under this paragraph **or the amount received** is subject to the grievance procedure. • • •"

The second proposal was completely rejected by RCA and the grievance procedure sub-paragraph remained unchanged (R. 79a-80a). The first proposal was accepted as to notice to employees of their status of eligibility but rejected as to automatic increases. The following sub-paragraph was inserted in the July 1954 agreement (R. 80a):

> "Each employee shall be informed within one month after the designated review date of his status of eligibility for merit increase and shall at the same time receive written notice that there has been compliance with this provision." [7]

Beginning in May 1958, the Association submitted its proposals for modification of the agreement involved in this case, which expired in July 1958 (R. 84a-85a). The Association proposed, *inter alia*, that the definition of "grievance," *supra*, p. 5, be changed to read (R. 86a):

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6. Wherever bold face appears in this Petition the emphasis is ours.

7. In the 1956 agreement, this sub-paragraph reads:

> "Each employee shall be informed on the designated increase eligibility date of his status of eligibility for a merit increase, and shall at that time receive a dated written notice signed by the Company, that there has been compliance with this provision. The employee shall sign two copies of the notice, retaining one copy and returning the other copy to the Company."

"Grievance shall mean disputes or differences between the Company and the Association or employees represented by it pertaining to (1) **any matter relating to conditions of employment not specifically covered by the agreement,** (2) any matter involving the interpretation or application of any provisions of this agreement, or (3) any matter involving the violation of any provisions of this agreement."

The Association further proposed (R. 86a-88a):

1. Elaborate changes in the merit increase paragraph (Paragraph 5.07), including the proposal that the term "merit increase" be construed to mean "increases of any amount";

2. A change in Paragraph 5.04 which would have given the Association the right to grieve "* * * if it regards any act of the company an abridgment of equitable salaries, equitable hours or equitable conditions of employment.";

3. A change in Paragraph 5.03 which would have permitted the negotiation and arbitration of salaries for new occupational classifications;

4. Deletion of the language of Paragraph 8.04 which provides that the arbitrator "* * * shall have no authority to add to, subtract from, or change any of the terms of this agreement * * * to change an existing wage rate, or to establish a new wage rate."; and

5. A provision giving the Association the right to utilize the grievance procedure for "* * * violations of the obligations of the Company to the Association and or effect [sic] more than one location or more than one division or more than one area chapter".

None of these proposals was accepted by RCA (R. 86a, 87a, 88a).

During the 1958 negotiations, the Association kept its membership advised as to position and progress by a pub-

lication, "Pulse", issued only during collective bargaining periods and concerned only with items of negotiation (R. 66a, 67a),[8] and by messages from the Association's President. In May 1958, the Association advised the members that "* * * any merit increase plan acceptable to the Association *must* * * * recognize the right of the Association to question the amounts of increases granted to engineers" (R. 90a). (Emphasis in original.) In June 1958, the members were told by the Association that RCA had rejected "with vehemence" the Association's proposals, including its insistence that disagreements on subjects not covered by the contract be arbitrated; that RCA was adamant in its position that items not specifically covered were not arbitrable (R. 95a).

A new merit review plan went into effect in February 1959.[9] In July 1958, when this new plan was first discussed, the Association advised its members that RCA refused to guarantee a "constant average merit increase" or to accord the "right to grieve on abuses of merit program" (R. 91a). In November 1958, the Association's President told the members that RCA refused to negotiate "on financial aspects of the merit program", with the result that the Association would have to bargain for a maximum general wage increase "which *is* a contractual item" (R. 92a). (Emphasis in original.) The Association's President recognized that the "merit program is not contractually guaranteed" and went on to comment on RCA's refusal to grant a contractually guaranteed "merit kitty" (R. 92a-93a).

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8. In addition to "Pulse," the Association put out two other publications. "Exponent" was a regular monthly publication. "Bulletin" came out periodically at times other than negotiation periods.

9. The unilateral nature of this plan, not within the collective bargaining procedures, is discussed in **Association of Professional Engineering Personnel v. Radio Corporation of America,** 183 F. Supp. 834, which deals extensively with the understanding of the parties in 1959.

There was a great deal of other testimony adduced (most of it by the Association) which went to the merits of the grievance.[10] However, there was nothing introduced contrary to the facts outlined above.

4. *The Decision of the District Court.* The district judge reviewed the background of the controversy, set forth the provisions of the agreement involved and analyzed the contentions of the parties (R. 150a-157a). He recognized the narrow role to be played by the courts in passing on questions of arbitrability in collective bargaining matters;[11] here, the limited inquiry was whether RCA had agreed to submit this type of dispute to arbitration (R. 159a). The district judge then pointed out that the particular "grievance" in question was not recognized by the contract and that the Association's contention necessarily ran afoul of the language which prohibited an arbitrator from changing existing wage rates or establishing new wage rates (R.

10. The Association's contention on the merits is that, prior to September 1957, the total of merit increases awarded by RCA to its employees amounted to a certain percentage of salaries while those granted subsequent to that time amounted to a lesser percentage. The Association asserts that RCA is obligated to grant a percentage level of merit increases which is consistent with the percentage level granted in prior years. The Association contended that, in prior years, the only factor considered by RCA in granting merit increases was the "level of performance" of the individual employee, but that, in September 1957, RCA began, for the first time, to consider certain other factors (R. 35a-37a). The Association did not fare very well in its attempts to prove that RCA's determination of the amount of merit increases subsequent to September 1957 involved consideration of any factors that had not theretofore been involved or that there was any company policy of reducing merit increases without consideration of the individual's merits. (See, *e.g.*, R. 42a-43a, 45a, 46a, 50a-51a, 53a-54a, 56a-57a, 60a-61a, 98a-99a, 100a-100a, 116a-123a, 127a-134a).

11. The district court opinion, filed on August 4, 1960, discussed (R. 157a-159a) this Court's opinions in **United Steelworkers v. American Manufacturing Co.**, 363 U. S. 564 (1960), and **United Steelworkers v. Warrior & Gulf Navigation Co.**, 363 U. S. 574 (1960).

159a-160a). Moreover, he held that his conclusion, that the contractual terms on their face clearly barred the asserted "grievance," was compelled by the evidence of intent (R. 161a-163a). The judge held that the "grievance" was not arbitrable (R. 163a), entered judgment for RCA on the complaint and dismissed the Association's counterclaim (R. 175a-176a).

5. *The Decision of the Court of Appeals.* The court of appeals made a speculative analysis of the provisions of the contract and concluded that they did not necessarily exclude the Association's "grievance" from arbitration. Here, the court stopped. On the basis of its understanding of this Court's decisions in **United Steelworkers v. American Manufacturing Co.**, 363 U. S. 564 (1960) and **United Steelworkers v. Warrior & Gulf Navigation Co.**, 363 U. S. 574 (1960), the court below thereupon reversed the judgment of the district court and directed arbitration. The opinion makes no reference whatsoever to the clear evidence of the intention and long-continuing understanding of the contracting parties.

REASONS FOR GRANTING THE WRIT.

In this case, the Court of Appeals has ignored the nature of the role assigned to it by Section 301 of the Labor Management Relations Act, *supra*, p. 2, and this Court's decision in **Textile Workers v. Lincoln Mills**, 353 U. S. 448 (1957). Rather than employing "judicial inventiveness" to reach a decision which fitted the collective bargaining agreement before it, the court of appeals has forced on the employer, by the application of an inflexible and legalistic rule, a promise which the employer not only did not make, but repeatedly and clearly refused to make. The court predicated its reasoning on this Court's decisions in **United Steelworkers v. American Manufacturing Co.**, 363 U. S. 564 (1960) and **United Steelworkers v. Warrior & Gulf Navigation Co.**, 363 U. S. 574 (1960).

As the result of the method of decision below, the Association has obtained from the court of appeals, as a matter of judicial policy, the very undertaking which it sought and could not obtain at the bargaining table. We submit that this use by the court of its power under Section 301 will not only disrupt existing collective bargaining agreements but will hinder and impair the whole process of achieving industrial peace through bargaining and agreement.

1. In **Lincoln Mills**, this Court held that Section 301 of the Labor Management Relations Act created the power and duty in federal district courts to fashion substantive law, "by judicial inventiveness", for the enforcement of collective bargaining agreements. Fear was immediately expressed that the system of industrial self-government known as collective bargaining, which had developed with little or no judicial intervention, would become subject to the imposition by courts of principles and standards developed against other backgrounds, "* * * not germane to the problem they will face * * *." Bickel and Wellington, **Legislative Purpose and the Judicial Process: The Lincoln Mills Case**, 71 Harv. L. Rev. 1, 25 (1957). A great danger was foreseen that district courts, not familiar with the field of labor-management relations, a self-contained field in many critical ways, would resort to literal and legalistic construction of the contracts before them, thereby destroying the usefulness of the collective bargaining process. See, *e.g.*, Cox, **Reflections Upon Labor Arbitration**, 72 Harv. L. Rev. 1482, 1484-1489 (1959).

2. On June 20, 1960, this Court handed down its opinions in the **American Manufacturing** and **Warrior** cases, and in **United Steelworkers v. Enterprise Wheel & Car Corp.**, 363 U. S. 593 (1960). Basically, the opinions were designed to allay the fears, expressed after **Lincoln Mills**, that foreign elements would be injected into the field of labor-

management relations. In each of these decisions, emphasis was placed on the duty of the courts to develop "* * * a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements * * *" with "* * * special heed [to] be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. * * *" 363 U. S. at 567. See also 363 U. S. at 578-582.

That the duty to develop "* * * a meaningful body of law * * *" presupposed the existence of a promise to arbitrate, was common ground to the majority opinions, the concurring opinion, and the dissent. The majority stated that "* * * arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit * * *." 363 U. S. at 582. The concurring opinion stated the issue to be "* * * whether the company agreed to arbitrate a particular grievance * * *." 363 U. S. at 571-572. And see 363 U. S. at 589-590.

Both the majority and the concurring opinions indicated that the basic determination—whether there is an enforcible promise to arbitrate—must be approached with full appreciation of the specialized field in which the determination is being made. The ultimate question is one of the intention of the parties to the particular contract. Although doubts are to be resolved in favor of coverage, 363 U. S. at 583, 573, construction of a collective bargaining agreement is not limited to an examination of its written provisions. External evidence as to the scope of the promise to arbitrate is also to be considered. The majority stated: "* * * In the absence of any express provision excluding the particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail * * *." 363 U. S. at 584-585. The concurring opinion stated: "* * * Words in a collective bargaining agreement * * * like words in a statute,

are to be understood only by reference to the background which gave rise to their inclusion." 363 U. S. at 570.[12]

No difficulty has flowed from these areas of basic agreement. Nor has any concern been caused by the actual outcome of the three cases.[13] However, certain language in the majority opinions permits of a reading so broad that the sharpest criticism has resulted. See Hays, **The Supreme Court and Labor Law, October Term**, 1959, 60 Colum. L. Rev. 901, 919-935 (1960); Davey, **The Supreme Court and Arbitration: The Musings of an Arbitrator**, 36 Notre Dame Law. 138 (1960); Meltzer, **The Supreme Court, Arbitrability and Collective Bargaining**, 28 U. Chi. L. Rev. 464 (1961); Snyder, **What Has the Supreme Court Done to Arbitration?**, 12 Lab. L. J. 93 (1961). The core of this criticism is that the majority opinions, over-emphasizing the *mystique* of the collective bargaining process[14] and taking as conceded a debatable proposition that an arbitration clause is the *quid pro quo* for a "no-strike" clause,[15] have in effect eliminated the search for the actual intent of the parties and

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12. See **Cox**, 72 Harv. L. Rev. at 1489.

13. In **American Manufacturing**, the Court rejected the doctrine of **International Ass'n of Machinists v. Cutler-Hammer, Inc.**, 271 App. Div. 917, 67 N. Y. S. 2d 317, *aff'd* 297 N. Y. 519, 74 N. E. 2d 464 (1947), and held that a grievance which fell within the contractually-agreed area of the arbitrator's jurisdiction was arbitrable whether or not a court believed the asserted grievance to be "frivolous." In **Warrior**, the Court held that a grievance protesting the contracting-out of certain maintenance work was arbitrable, where the collective bargaining agreement contained a very broadly-phrased arbitration clause, which was limited only by an undefined "function of management" clause. Finally, in **Enterprise**, the Court held that an arbitrator's award of back pay subsequent to the date of termination of the collective bargaining agreement was within the arbitrator's power and was judicially enforcible.

14. **Hays** at 924-925, 930-932; **Meltzer** at 479-482; **Davey** at 140-145; **Snyder** at 94-97.

15. **Hays** at 932-933; **Meltzer** at 477-478.

converted the question of arbitrability into a matter of verbalisms.[16]

3. The decision below is, we submit, an extreme example of the erroneous approach to the problem of ascertaining whether there was an enforcible promise to arbitrate—the kind of legalistic and unrealistic construction of the bargain between the parties which the legal scholars and writers in the field of labor law fear.

The Association's contention, as viewed by the court below, was that the contractual term "merit increase" was "* * * understood and accepted by both contracting parties * * *" to connote "* * * a minimum average level of periodic increases determined on the basis of the amounts of

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16. Professors Hays and Meltzer envisage, as the logical outcome of the majority opinions in **American Manufacturing** and **Warrior**, that the standard "interpretation and application" arbitration clause may automatically require a referral to arbitration of any grievance which purports to be based on a substantive provision of the contract, even where the grievance, on its face, is plainly repugnant to the substantive provision relied upon. **Hays** at 920-925; **Meltzer** at 467-468, 474-475. For example, Professor Hays hypothesizes a provision that an employer would "not" be required to pay a bonus in a contract which contains an "interpretation and application" arbitration clause. He concludes that, under a broad reading of the majority opinions, a grievance charging the company's failure to pay a bonus would be arbitrable since the question of "bonus" has been made a part of the contract and a "grievance" with regard to "bonus" involves the "interpretation and application" of that provision of the contract.

The same analysis has been made of the impact of the **Enterprise** opinion on the scope of review of an arbitrator's award. So long as the award is said by the arbitrator to rest on a provision of the contract, the award must be enforced; only the "rhetoric" of the award is regulated. **Meltzer** at 484-485. See, also, **Hays** at 929. **Enterprise** has recently given rise to a conflict of authority between the Courts of Appeals for the Fourth and Fifth Circuits. Compare **Textile Workers v. American Thread Co.**, 48 LRRM 2534 (C. A. 4, decided June 5, 1961), with **Lodge No. 12, Machinists v. Cameron Iron Works**, 48 LRRM 2516 (C. A. 5, decided June 27, 1961).

increases in past years * * *'" (App., *infra*, pp. 6a-7a).[17] Fairly construed, the contract itself refutes the notion that this "grievance" was arbitrable. Paragraph 5.02, *supra*, p. 5, embodies the salary rate for the various classes of employees and contains an undertaking by RCA to make three general increases of 3% each during the eighteen-month life of the contract. Paragraph 5.07, *supra*, pp. 5-6, which specifically covers merit increases, makes clear that both eligibility and amount are determined on an individual employee basis. This paragraph contains elaborate provisions with respect to individual eligibility dates and notification to individual employees as to their status of eligibility, and contains a specific provision that a dispute as to a particular "* * * employee's eligibility for a merit increase * * *" is "* * * subject to the grievance procedure. * * *."

Clearly, there is nothing in these provisions to support the notion that they contain a promise by RCA to pay an additional average lump sum. Percentage increases are covered by Paragraph 5.02; individual merit matters are covered by Paragraph 5.07. And Paragraph 5.07 specifically makes arbitrable questions as to an individual employee's eligibility. Questions as to the amount of an individual employee's merit increase were not made arbitrable and a specific proposal to make such questions arbitrable was rejected in negotiations. *Supra*, p. 8. Thus, the provision of the contract on which the Association purports to rely negates arbitrability of its "grievance."

Moreover, even if Paragraph 5.07 could be construed as touching on merit increases for the group as a whole, the amount of the group increase is clearly not arbitrable. First, under Paragraph 5.07, "eligibility" is the only aspect of the merit increase program that is arbitrable. Second,

17. The "minimum average amount" sought by the Association was for "the group as a whole," as the grievance itself makes clear (R. 36a-37a). The allocation of this lump sum among particular employees is no part of the Association's "grievance."

the general arbitration clause specifically provides that the arbitrator has no authority "* * * to change an existing wage rate, or to establish a new wage rate. * * *" *Supra*, p. 6. In this case, RCA granted merit increases. The Association wants more merit increase dollars for the group. An order by an arbitrator that RCA pay more merit increase dollars to the group as a whole would clearly be a change in an existing wage rate or the establishment of a new wage rate. Here, again, the bargaining history makes clear that the Association has always recognized that there was no contractually guaranteed "merit kitty" in this collective bargaining agreement. *Supra*, p. 10.

The court of appeals, rather than undertaking to ascertain the intent of the parties to this particular collective bargaining agreement, approached the problem of construction as though it had a mandate to seek and find arbitrability. Its analysis proceeded from this premise.

First, the court held that the Association's contention —that there was an unwritten understanding as to the meaning of the term "merit increase" in Paragraph 5.07— brought the "grievance" within the "interpretation and application" language of the arbitration clause (App., *infra*, pp. 6a-7a). In other words, the court held that the Association established jurisdiction in the arbitrator by picking out a phrase in a provision of the contract and charging that the phrase embodied an unrecorded and unusual understanding. Instead of applying "judicial inventiveness" to achieve a realistic solution of the particular problem before it, the court below relegated the matter of arbitrability to the pleading skill of the draftsman of a "grievance".

Next, the court stated that the exclusionary clause of the arbitration provision did not exclude the "grievance" since, if the Association were correct on the merits of its contention, the arbitrator would merely be enforcing the agreement of the parties (App., *infra*, pp. 7a-8a).[18]

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18. The court below analogized the present case to a situation where the contract provides for a 5% wage increase and

Finally, the court held that the specific inclusion in the grievance procedure of disputes "as to the employee's eligibility for a merit increase" did not compel the conclusion that disputes over the amount of merit increases were not arbitrable. The court said that, since "* * * it was arguable * * *" that disputes over eligibility did not depend on "interpretation and application" of the contract but rather on RCA's judgment as to an individual's work, a separate provision was needed to make such disputes arbitrable (App., *infra*, pp. 8a-9a).[19]

4. With this strained analysis—only understandable if it be assumed that the court was deliberately seeking to impose a duty to arbitrate—the court of appeals stopped. No mention whatever was made in the opinion of the proof contained in the record as to the intent and understanding of both parties to the agreement with respect to the complete non-arbitrability of all financial aspects of the merit program.[20]

5. The approach of the court below to the problem of construction, crystallized in this case, was foreshadowed

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the employer only grants 4% on the agreed date. (App., *infra*, p. 8a.) Given such a provision, the wage rate is established by the contract and the arbitrators' sole function is to enforce it. In the instant case, the arbitrator must establish the rate, under the "grievance," and do so without reference to any provision of the contract.

19. This reasoning is, of course, directly contrary to that employed by the court in holding that the Association's "grievance" involved a dispute over "interpretation and application." In fact, the court here seems to understand that the parties chose the "interpretation and application" clause as the conventional formula for narrowly defining the function of the arbitrator. See **Cox**, 72 Harv. L. Rev. at 1500-1501.

20. Other courts have dealt differently with proof of record as to the intent of the parties to a collective bargaining agreement. In **Maryland Tel. Union v. Chesapeake & Potomac Tel. Co.**, 187 F. Supp. 101 (D. Md. 1960), Chief Judge Thomsen stated that it was "* * * hard to believe * * *" that this Court's decision in **Warrior** required him to order arbitration of a grievance which embodied the same demand that the union

by its opinion in **Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.**, 283 F. 2d 93 (C. A. 3, 1960). There, the court announced that it would be improper to examine proof of the company's contention that the negotiating history plainly established that the union was seeking to obtain through arbitration the precise thing which it had voluntarily bargained away.

Thus, the law is fixed in one of the most important industrial circuits in the country. These two decisions stand for the proposition that a union may obtain, as a matter of judicial policy, the very thing which it failed to obtain in bargaining or which it actually traded away as a deliberate negotiating choice. The impact of the decisions on existing collective bargaining agreements is clear.

But the greatest impact of these decisions will be in their effect on the whole collective bargaining process for the future.[21] The negotiation of collective bargaining agree-

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had bargained away during collective bargaining negotiations. He expressed the view that the contrary was still the law. However, Judge Thomsen felt that it was "wisest" to order arbitration "* * * in the present uncertain state of the law * * *." 187 F. Supp. at pp. 108-109. In **Local No. 725, Int'l Union of Operating Engineers v. Standard Oil Co.**, 186 F. Supp. 895 (D. N. Dak. 1960), Chief Judge Register, after stating that the arbitration provision "* * * should be interpreted in accordance with the intention of the parties as therein expressed and in the light of the facts and circumstances surrounding the negotiations for and execution of the agreement, * * *" 186 F. Supp. at p. 899, fully examined the surrounding circumstances and, on the basis of the evidence before him, concluded that the asserted "grievance" was not arbitrable. He placed great weight on the language contained in Justice Brennan's concurring opinion. 186 F. Supp. at pp. 899-900.

21. Although the opinion below in the instant case made no mention of the proof of intent in the record—or that there was any such proof—, those whose duty it is to deal with labor-management relations in this highly-industrialized circuit are fully aware of what was involved in the instant case and the significance of the decision below. Labor-management advisors do not and can not rely solely upon a reading of reported decisions; when necessary, they glean the practical circumstances from the loose-leaf services and from their brethren in the labor relations field.

ments is a day-to-day business matter of the greatest importance to all employers and those who counsel management. We do not mean to suggest that it is not of equal importance to labor unions and those who counsel them. But we are here dealing with the question of how much of an employer's right to make decisions with regard to the management of his enterprise is to be surrendered to an outsider, the arbitrator.[22] Although employers may be perfectly willing to surrender some of their control to the arbitrator, it is a fundamental tenet that most employers are not willing to submit everything to arbitration. Even an arbitration provision which contains only the conventional "interpretation and application" clause indicates that the employer "* * * distrusts arbitration at least to the point of insisting upon the inclusion of some safeguard against the arbitrator's imposition of significant obligations not contemplated by the agreement and quite beyond its scope. * * *"[23]

The collective bargaining agreement is, of course, an instrument which is not subject to the same rules of construction that one applies to a deed or trust indenture. There are too many unforeseen contingencies in the area of industrial self-government for such an approach, and the collective bargaining agreement is designed for flexible application.[24] Here, however, there is no question of an unforeseen contingency. The parties have squarely addressed themselves to a specific problem and have agreed that the solution of the problem is for the employer alone, and not for an arbitrator. In such a case, mechanistic rules of construction cannot be invoked to compel submission of the problem to an arbitrator. So long as arbitration is consensual, and not compulsory, its success depends upon the willingness of both sides to submit disputes to arbitration. An employer who, because a court refuses to look at intent,

22. *Cf.* Cox, 72 Harv. L. Rev. at 1498-1499.
23. *Id.* at 1509. See also, *id.* at 1514.
24. *Id.* at 1490-1493, 1498-1499.

finds himself compelled to arbitrate that which was understood to be non-arbitrable, will be reluctant to enter into an agreement for the future which may be so construed by a court.

One way in which an employer can solve this dilemma is to stand unalterably opposed to the insertion of any arbitration provision in the agreement. To succeed in this demand is to do away with all of the benefits of arbitration. Merely to make the demand would increase the likelihood of industrial strife. On the other hand, he can attempt to include, in the arbitration provision itself, a series of detailed exclusions. Not only would this endlessly complicate negotiations and destroy a major aspect of the utility of the written collective bargaining agreement,[25] but it also would place such an overemphasis on the written words of the agreement that a skillful draftsman could avoid the exclusions by manipulating the wording of a "grievance." The employer might also attempt to define "grievance" very narrowly, *e.g.*, "disputes relating to seniority, discharge or promotion."[26] Not only would this be completely unacceptable to most unions, but such a provision destroys the utility of the collective bargaining agreement when an unforeseen contingency, fairly within the intendment and function of the agreement, arises.

None of these disruptive consequences need occur if the plain intent of the parties to a particular collective bargaining agreement be taken as controlling. The problem flows entirely from the artificial reliance on verbalisms without regard to the intent of the parties, a judicial method long since abandoned in commercial law and statutory construction problems.

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25. As Professor Cox points out, it is very important that the agreement "* * * be kept short and simple enough for the ordinary worker to read and understand. * * *" *Id.* at 1490.

26. *Cf., id.* at 1508.

CONCLUSION.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,455

RADIO CORPORATION OF AMERICA

v.

ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL CAMDEN AREA CHAPTER; AND CHARLES M. BRINDLEY,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued April 6, 1961

Before: GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges.*

Opinion of the Court.

(Filed May 25, 1961)

By HASTIE, *Circuit Judge.*

For some fifteen years the terms and conditions of employment of engineering personnel at Radio Corporation of America, hereinafter called RCA, have been the subject of a series of labor contracts between RCA and Association of Professional Engineering Personnel, a labor union. The present controversy arises under a labor contract between these parties which was effective throughout 1957 and until July 1, 1958.

The contract in question, like its predecessors, outlined a procedure for granting periodic "merit increases" to engineering personnel. In April 1958, the union, dissatisfied with the employer's administration of the merit increase system, filed a written grievance complaining that RCA had violated the contract by improperly lowering the average level of merit increases and by considering improper factors in determining their amount. RCA replied that the amount of merit increases was neither grievable nor arbitrable under the contract and that, in any event, the grievance was not timely. The union then submitted the matter to the American Arbitration Association and, over the employer's objection, that organization instituted arbitration proceedings.

RCA countered by filing the present complaint in the United States District Court for the District of New Jersey seeking under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, an authoritative adjudication that the union's stated grievance is not arbitrable. The union then filed a counterclaim asking that RCA be ordered to arbitrate the grievance. After full hearing, the court entered final judgment in favor of the employer permanently restraining the union from taking its grievance to arbitration and dismissing the union's counterclaim.

Because of the wording of Section 301 of the Labor Management Relations Act, it is necessary to resolve a preliminary question of jurisdiction. That section creates federal jurisdiction over "suits for violation of contracts between an employer and a labor organization. . . ." In its counterclaim the union asserts that the refusal of RCA to arbitrate a certain grievance constitutes a breach of their collective bargaining agreement. This is the type of "violation" which Section 301 most obviously covers. Indeed, it is now established that such a proceeding to compel arbitration, alleged to be required by a labor contract,

presents a cause of action which is created by as well as federally cognizable under Section 301. *Textile Workers Union v. Lincoln Mills*, 1957, 353 U.S. 448.

It is less clear that the employer's complaint against the union, seeking an adjudication that the stated grievance is not arbitrable under the collective bargaining agreement, is a "suit for violation of a contract" within the meaning of Section 301. However, we think that in the context of Section 301 the more reasonable reading of "suits for violation of contracts" includes a proceeding by a party who seeks to determine by declaratory judgment whether his own conduct in refusing to arbitrate is a violation of a labor contract. This court and at least one other have assumed as much in cases where the issue of jurisdiction was present but was not raised by the parties. *International Tel. & Tel. Corp. v. Local 400*, 3d Cir. 1960, 286 F.2d 329; *Boston Mutual Life Ins. Co. v. Insurance Agents Int'l Union*, 1st Cir. 1958, 258 F.2d 516. One district court has squarely so held, stating the argument for its position persuasively:

> "But 301 should not be read literally and with stress on the word 'violation'. Congressman Hartley, who was the co-author and sponsor of the Labor Management Relations Act, 29 U.S.C.A. § 141 et seq., in responding to an interpellation by Congressman Barden, construed the language which became § 301 as contemplating not only ordinary lawsuits for damages and equitable relief, but also 'proceedings . . . brought by employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.' 93 Cong. Rec. 3656-3657. This enlargement of the letter of § 301 has gained the apparent approval of the Supreme Court and has been used as an essential link in its chain of reasoning in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 455-456, 77 S.Ct. 912,

> 1 L.Ed. 2d 972. See also 353 U.S. at page 521, 77 S.Ct. at page 952. This enlargement corresponds with the general policy which Congress adopted in the Labor Management Relations Act,—a policy of strengthening labor contracts by using the federal courts to award damages for breaches of those contracts."

New Bedford Defense Products Division v. Local 1113, D.Mass. 1958, 160 F.Supp. 103, 109, *aff'd* 1st Cir., 258 F.2d 522; *accord Armstrong Norwalk Rubber Corp. v. Local 283*, D.Conn. 1958, 167 F.Supp. 817. *But cf. Mengel Co. v. Nashville Paper Products and Specialty Workers Union*, 6th Cir. 1955, 221 F.2d 644.

We conclude that both the employer's present claim and the union's counterclaim arise under Section 301 of the Labor Management Relations Act and also that the claim is cognizable under the Declaratory Judgment Act.

We come now to the merits of the demand for arbitration which must be determined in the light of the provisions of the controlling labor contract. That contract defines "grievances" as meaning "disputes or differences . . . with respect to the interpretation or application of any provision of this Agreement". It then spells out in detail the procedures to be followed in the presentation and disposition of "grievances". The first step embraces the formal submission of a grievance by the union to the employer and the ensuing efforts of the parties to adjust the matter between themselves. If this fails, the second prescribed step is arbitration pursuant to a written demand by either party. In providing for arbitration the contract stipulates that the "authority of the Arbitrator shall be limited to determining questions involving the interpretation or application of the terms of this Agreement or the applicable Area Agreement. He shall have no authority to add to, subtract from, or to change any of the terms of this Agreement or any Area Agreement, to

change an existing wage rate, or to establish a new wage rate".

The present dispute concerns merit increases. This subject is covered by the following provisions of the contract:

> "*Paragraph 507* MERIT INCREASES: The performance of employees shall be reviewed for merit increases. The merit increase eligibility dates of employees shall be determined in accordance with the following schedule:
>
> . . . . . .
>
> [the schedule which appears at this point provides intervals of 8 to 13 months between merit increase eligibility dates according to occupational categories.]
>
> . . . . . .
>
> "Each employee shall be informed on the designated increase eligibility date of his status of eligibility for a merit increase, and shall at that time receive a dated written notice signed by the Company, that there has been compliance with this provision. The employee shall sign two copies of the notice, retaining one copy and returning the other copy to the Company.
>
> "If an employee is advised that he is eligible for a merit increase, such increase shall become effective on the designated increase eligibility date. His next increase eligibility date will be in accordance with the provisions of this paragraph 5.07.
>
> "If an employee is advised that he is not eligible for an increase his next increase eligibility date will be three months from his last merit increase eligibility date.
>
> "Any disagreement by the Association with the decision of management as to the employee's eligibility for a merit increase under this paragraph is subject to the grievance procedure. Nothing in this Agreement shall prevent the Company from making

such individual interim increase as in its judgment individual effort and efficiency may warrant."

We next quote the union's statement of the grievance it seeks to arbitrate in this case to show its relation to the merit increase provisions of the contract. The union's formal statement of grievance as submitted to the employer in April, 1958 reads as follows:

> "Under the Agreement, the Company is obligated to review, periodically, the performance of employees for the purpose of determining whether the particular employee is entitled to a merit increase. Under the Agreement and by established practice, the Company has become obligated to grant a level of increases which, for the group as a whole, is consistent with the level granted in prior years and has also become obligated to base the level of increase for any individual employee upon his level of performance. The Company has now violated the Agreement and these established practices by reducing the general level of merit increases and by basing individual increases upon factors other than the level of performance."

In this context we must decide whether the present dispute involves "the interpretation or application of the terms of" the contract, as that phrase is used in the agreement of the parties defining the types of disputes which should be arbitrable.

We think the union's contention amounts to this. Over the years during which each successive contract covering engineering employees has provided for "merit increases", that phrase has come to have a particular meaning understood and accepted by both contracting parties. According to the union, the phrase "merit increases" connotes a minimum average level of periodic increases determined on the basis of the amounts of increases in past years. It also requires that the amount of each in-

crease be determined solely upon the quality of the performance of the individual employee. This interpretation of the contract, which limits the discretion of the employer in determining the average level and amount of merit increases, is vigorously disputed by RCA. The opinion of the court below also seems to reflect the view that the union's interpretation of the contract is erroneous. We express no opinion on that point.

The Supreme Court has very recently made it clear that it is not a court's function in such a situation as this to judge the merits of a grievance which presents a dispute as to the meaning of a provision of a labor contract. So long as the complaining party bases its grievance on an alleged failure to perform an obligation of a contract, a standard arbitration clause making disputes "involving the interpretation or application of any provision" of the contract arbitrable should be enforced by a judgment requiring arbitration. *United Steel Workers v. American Mfg. Co.*, 1960, 363 U.S. 564. In that case the court stated that "the function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." 363 U.S. at 567-568. Accordingly, if there were nothing relevant in the labor contract except the language already discussed, the present dispute would unquestionably be arbitrable.

It remains to consider one express and one allegedly implied exception to the otherwise comprehensive agreement to arbitrate disputes involving the interpretation of any provision of the contract. The express exception appears in the sentence of the contract immediately following the general provision for arbitration of disputes concerning the interpretation of the instrument. It reads that the arbitrator "shall have no authority . . . to change an

existing wage rate, or to establish a new wage rate". The employer reasons that if an arbitrator should disturb the amount of a merit increase which the employer has granted, the arbitrator would "change an existing wage rate" and "establish a new wage rate". But if the union is correct in its interpretation of the merit increase provisions—and we do not imply that it is—then the minimum average level of periodic merit increases and the relevant criteria for their determination, as well as the time when they are due, have already been fixed by agreement of the parties. The arbitrator's ruling on this dispute as to the amount of merit increases would thus merely enforce a contractual scheme of escalation. Certainly, if a contract provided for a wage increase of 5% at the end of a year and the employer granted only a 4% increase at that time, an award of the difference could not be characterized as action changing an existing wage rate or establishing a new one. This would be true of the present case also, if, as assumed above, the arbitrator should conclude that the merit increases granted by RCA were less than an agreed minimum or had been calculated in disregard of agreed criteria.

Finally, and as a separate point, RCA finds an implied limitation upon the arbitrability of grievances concerning merit increases in that sentence of the merit increase section of the contract which provides that "any disagreement by the Association with the decision of management as to the employee's eligibility for a merit increase under this paragraph is subject to the grievance procedure". From this specific provision making individual "eligibility" for a merit increase arbitrable, RCA draws the negative inference that no other aspect of the administration of the merit increase plan is arbitrable. However, this provision may well have been included in the contract because it was arguable that such a dispute did not depend upon any "interpretation or application" of the agreement, but rather upon judgment as to the quality of an individual's

work. This would have made the general provision for arbitration of questions of contract interpretation and application inapplicable and a separate provision would have been needed to make this kind of controversy arbitrable. In this view of the matter the inclusion of the special arbitration provision would not give rise to any logical implication that disputes concerning the interpretation of the merit increase section are not arbitrable under the general arbitration clause.

A recent ruling of the Supreme Court is helpful in our disposition of this effort to limit the agreed area of arbitration. In *United Steel Workers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574, the collective bargaining agreement contained both a general agreement for arbitration of disputes as to the meaning and application of the contract and an express exemption of "matters which are strictly a function of management". The dispute in controversy concerned the contracting out of certain repair work and the consequent layoff of some employees. In holding that the grievance was arbitrable the Court said that "in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad". 363 U.S. at 584-585. Earlier in the opinion the Court had ruled that an "order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage". 363 U.S. at 582-583. This approach is decisive here where the general arbitration clause is comprehensive and the alleged exclusion is derived by doubtful implication from an additional provision of the contract for arbitration in a special case. Certainly the implied

exclusion is not clear. We must resolve the substantial doubt which exists in favor of coverage.

We conclude, therefore, that the present grievance is a dispute concerning the interpretation of a labor contract and is covered by the contractual undertaking of the parties to arbitrate such disputes. We repeat that neither this holding nor anything said in this opinion is intended to prejudice in any way the merits of the dispute which the arbitrator will be asked to decide.

The one other point requiring comment is the contention of RCA that under the provisions of the contract, the present grievance is not timely. This court has ruled very recently that such a question is itself a matter of contract interpretation for decision by the arbitrator. *International Tel. & Tel. Corp. v. Local 400, supra.* We adhere to that position.

The judgment will be reversed and the cause remanded for the entry of judgment denying relief on the complaint and granting relief on the counterclaim.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,455

RADIO CORPORATION OF AMERICA

v.

ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL, CAMDEN AREA CHAPTER; AND CHARLES M. BRINDLEY

ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL, CAMDEN AREA CHAPTER,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded for the entry of judgment denying relief on the complaint and granting relief on the counterclaim.

Attest:

IDA O. CRESKOFF,
Clerk.

May 25, 1961

FILED
OCT 17 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 344.

RADIO CORPORATION OF AMERICA,

Petitioner,

v.

ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL CAMDEN AREA CHAPTER; and CHARLES M. BRINDLEY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 344.

RADIO CORPORATION OF AMERICA,
Petitioner,

v.

ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL CAMDEN AREA CHAPTER; AND CHARLES M. BRINDLEY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey (R. 150a-176a) [1] is unreported. The opinion of the Court of Appeals (App., *infra*, pp. 1a-10a) is reported at 291 F. 2d 105.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

1. Record references herein are to the Joint Appendix in the court below.

QUESTION PRESENTED.

Whether, under the decisions of this Court, a company may refuse to arbitrate a grievance which by its terms involves a dispute between the parties as to the interpretation or application of a provision of the labor agreement where the language of the labor agreement itself specifically provides that grievances are defined as disputes or differences with respect to the interpretation or application of any provision of the agreement.

COUNTER-STATEMENT.[2]

The litigation here relates to the right of the Association of Professional Engineering Personnel to require that a particular grievance be arbitrated. The Action was originally instituted by the Radio Corporation of America (hereinafter referred to as "RCA") under Section 301 of the Labor Management Relations Act of 1947,[3] as amended, and the Declaratory Judgment Act of June 25, 1948,[4] as amended.

The Plaintiff RCA, is a corporation, organized under the laws of the State of Delaware, having a principal place of business in Camden, New Jersey. The Defendants, Association of Professional Engineering Personnel and Association of Professional Engineering Personnel Camden Area Chapter, are, for the purposes of this appeal, identical (and are referred to hereinafter as "Association") The Defendant, Charles M. Erindley, was the President of the Association at the time this action was instituted and, otherwise, his inclusion as a Defendant is of no significance in this matter. The Association is an unincorporated labor organization, having offices in Camden, New Jersey and representing a collective bargaining unit made up of engineering person-

2. The Counter-Statement is substantially the same as the statement of facts set forth in the Brief filed on behalf of the Association of Professional Engineering Personnel in the Court of Appeals.

3. Act of June 23, 1947, Title 29 U. S. C. § 185.

4. 68 Stat. 890, Title 28 U. S. C. §§ 2201 and 2202.

nel employed by RCA at its Camden, Cherry Hill and Moorestown, New Jersey plants.

The Association and RCA entered into a written collective bargaining agreement (hereinafter referred to as "Contract"), effective December 14, 1956, to continue to July 1, 1958, covering the terms and conditions of employment for the employees represented by them. The Contract was attached to the Plaintiff's Complaint as Exhibit "A" and its pertinent provisions are reprinted in the joint appendix, pages 137a through 149a.

The dispute which is the basis for this litigation arises under paragraph 5.07 of the Contract (Joint App. 141a-142a) This paragraph provided for the procedure whereby employees of RCA who are members of the Association are reviewed for the purpose of arriving at merit increases.

Article 8 of the Contract contains a detailed procedure for processing all grievances (Joint App. 142a-147a). The term "grievances" is defined under Article 1 of the Contract as meaning ". . . disputes or differences between the Company and the Association, or employees represented by it, with respect to the interpretation or application of any provision" of the Contract (Joint App. 137a).

In early 1958 the defendant Association was approached by certain of its members with complaints that they had received merit increases substantially lower than those received on prior occasions. Investigation of these complaints by the Association led to the conclusion that the reduced increases bore no relationship to the employees' level of performance. In view of this conclusion, a number of grievances were filed in February and March of 1958, each one pertaining to the failure of the Company to abide by the Labor Agreement and the practices established by the parties. At the meetings called to discuss these grievances, however, the Company refused to present any justification for the reduced merit increases, and instead took the adamant position that the issue submitted was not grievable. One by one, therefore, the grievances were denied.

As a consequence of these events the Association became aware that a great number of its members were receiv-

ing reduced merit increases. This being so, it became incumbent upon the Association to take whatever steps as might be necessary to protect the interests of its members.

The Association made a detailed analysis of the information it had on hand, some of it having come from the Company, and some from its members. The result of that analysis was a conclusion that the company had embarked upon a positive program of reducing the general level of merit increases granted. This was not evidenced by isolated instances of reduced increases, but by an obvious, across-the-board pattern of reductions, and, as far as could be determined, this program had its inception in or about September, 1957.

Faced with this realization, the Association filed a grievance with the Company on April 17, 1958. The written grievance, as amended at the grievance meeting, stated:

> "The Association grieves for the following reasons: Under the Agreement, the Company is obligated to review, periodically, the performance of employees for the purpose of determining whether the particular employee is entitled to a merit increase. Under the Agreement and by established practice, the Company has become obligated to grant a level of increase which, for the group as a whole, is consistent with the level granted in prior years *and has also become obligated to base the level of increase for any individual employee upon his level of performance.* The Company has now violated the Agreement and these established practices by reducing the general level of merit increases and *by basing individual increases upon factors other than the level of performance.* The Company is requested to review the merit increase records for all employees starting with September, 1957, and to revise their decisions as to individual merit increases so as to bring the average level of merit increases granted up to the average existing prior to that date." (Emphasis added.) (Joint App. 36a-37a)

The Company's answer to the grievance was as follows:

> "The Company contends that the amount of a merit increase is not arbitrable under the Master Agreement. Even if this were a proper subject for arbitration, the Association's grievance is untimely in that the written grievance was presented more than 40 days after the occurrence of the alleged grievance.
>
> The Company denies that it has violated the Master Agreement and denies the Association's request for a review of the amounts of increases granted, on the basis of the Company's sole obligation to determine the amount of a merit increase." Joint App. 37a)

On May 9, 1958, the Association, in compliance with Paragraph 8.04 of the Labor Agreement (Joint App. 145a-147a), referred the matter to the American Arbitration Association, and at the same time the Company was informed of the action taken by the Association. On May 22, 1958, the Association was notified by the American Arbitration Association that it had received a letter from an attorney for the Company, questioning the arbitrability of the matter. Accordingly, a letter was sent to the American Arbitration Association, signed by the attorneys for the defendant Association, briefly presenting the Association's reasons for believing the matter to be arbitrable.

The American Arbitration Association replied to both parties on June 10, 1958 that as a non-judicial administrative agency, it had no choice but to proceed with the matter. A list of arbitrators was submitted to both parties, and selection was made of Mr. Eli Rock, an experienced and well known labor arbitrator. Although the Company participated in the selection, it did so without waiving its right to contest arbitrability.

On July 10, 1958, the Company filed a Complaint in an attempt to prevent arbitration of the merit review issue, and thereafter the Association filed its answer, putting the

matter at issue. As a consequence of the filing of the Complaint, the Arbitration Association ceased its administration of the matter, pending the outcome in the District Court (Joint App. 20a-21a). Later, the Arbitration Association, at the insistence of the defendant, decided to proceed with the arbitration (Joint App. 22a-23a). Plaintiff then secured the temporary restraining order of the District Court, and pursuant to said Order, the Arbitration Association once again suspended the administration of this matter.

Thereafter, a hearing was held before the Court on an Order to Show Cause why a preliminary injunction, until final hearing, should not be issued and, on February 20, 1959, the District Court Judge issued an Order continuing the restraints theretofore imposed by the Court against the Defendants until final hearing of the cause (Joint App. 34a).

Final hearing of the matter was held before the District Court Judge on April 18, 1960 and April 19, 1960 at which time testimony was offered and various exhibits were received in evidence. Thereafter on August 4, 1960, the District Court Judge issued an opinion, finding for the Plaintiff, RCA, on its Complaint, and against the Defendants on their Counterclaim (Joint App. 150a-164a). Counsel for RCA was requested to file appropriate findings of fact and conclusions of law and thereafter on September 21, 1960, the Court filed its Findings of Fact and Conclusions of Law (Joint App. 165a-174a). The Order of Final Judgment was filed by the District Court on September 27, 1960 (Joint App. 175a-176a).

The Association then appealed the Order of the District Court to the U. S. Court of Appeals for the Third Circuit. Argument was held on April 6, 1961 and on May 25, 1961 the Court of Appeals unanimously reversed the judgment of the District Court and ordered that the cause be remanded for the entry of judgment denying relief on the Complaint and granting relief on the Counterclaim (App. pp. 1a-10a of the Petition).

ARGUMENT.

I. There Is No Conflict of Decision.

Petitioner's Brief, understandably, makes no reference to a conflict of decisions between Circuit Courts or between the instant decision and any decision of this Court, for the reason that none exists. It does attempt to create an illusion of conflicting views by utilizing the opinions of some textwriters together with short extracts from both the majority and concurring opinions of this Court in *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564 (1960) and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). By editorializing the short excerpts from those Opinions together with references to the commentaries of some of the textwriters, the Petitioner attempts to convey the impression that there may be some inconsistency in the decisions of the Courts which involve similar questions.

This is merely a smoke screen. Beginning with this Court's decision in *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957)—and even earlier by virtue of the decisions in the lower Courts—there has emerged a philosophy of enforcement of agreements to arbitrate labor disputes. This philosophy has coalesced into a firm policy by virtue of the *American Manufacturing Co.* and *Warrior & Gulf Navigation Co.* decisions by this Court.

What has been the result of the clarification of this policy by this Court?

This much is certain. When parties sit down to negotiate a labor agreement, including a provision for arbitration, they can now do so with assurance that they will have full opportunity to utilize the forum which they have chosen. There is now a degree of predictability which did not exist when the law was cluttered with decisions such as *International Association of Machinists v. Cutler-Hammer, Inc.*,

271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd, 297 N. Y. 519, 74 N. E. 2d 464 (1947).[5]

The Petitioner, in its Brief, alludes to the impact of the decisions of the Court of Appeals of the Third Circuit (and necessarily, the decisions of this Court which formed the basis for the Third Circuit opinions) upon future collective bargaining. It is implied that employers may insist upon less inclusive arbitration provisions.

If this is so, then where has either labor or management been disadvantaged? The overriding consideration in the consummation of a labor agreement is predictability, and when matters are presented to the Courts, the parties are seeking prescribed standards upon which to base a future course of action. If the parties are fully aware of the coverage of a broad arbitration clause, they will not blindly agree to such provision.

Collective bargaining necessarily involves a give-and-take procedure in which the parties, by virtue of their relative economic strengths or weaknesses, arrive at an agreed-upon body of laws for industrial self-government. Having reached such agreement, the parties are entitled to rely upon it.

Where a labor organization is, by the nature of its relationship with management, agreeable to accepting less than a broad authorization for arbitration, no one should be heard to complain. But where, as in this case, the arbitration provision is broad, then the parties should not later be frustrated in their attempts to utilize it.

This is essentially what the Courts have said, and ultimate sanction was afforded to the rather consistent lower Court decisions by the decisions of this Court in *American Manufacturing Co.* and *Warrior & Gulf Navigation Co., supra.* There is not the slightest element of conflict between the Courts on the question presented in this case.

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5. This Court specifically rejected the doctrine enunciated in the *Cutler-Hammer* decision in its decision in *American Manufacturing Co., supra.*

II. There Is No Important Question of Federal Law Which Has Not Previously Been Answered by the Supreme Court.

Petitioner's Brief vigorously attempts to rehash the factual background of this matter in order to convince the Court now that there is something distinctive or novel about this case. But this is simply not so. It is true that the factual circumstances of different matters are rarely identical. The identity ordinarily arises, so far as this Court is concerned, in the legal issues which flow from the different factual situations.

Prior to *Lincoln Mills, supra*, it could truthfully be said that the issues which have arisen here involved novel and important questions of Federal law. In *Lincoln Mills* this Court took the first step toward answering some of the then existing doubts. There still remained the important question of the extent to which a broad arbitration clause in a contract should be applied. This Court disposed of that issue in the landmark *American Manufacturing Co.* and *Warrior & Gulf Navigation Co.* cases, *supra*, and these latter two decisions *disposed of the instant case.* This was clearly stated by the Circuit Court in the instant case and no matter how the Petitioner struggles to circumvent these precedents, it simply can not do so successfully.

The similarity of approach in the contractual language in the *American Manufacturing Co.* and *Warrior & Gulf Navigation Co.* cases and in the instant matter is both highly significant and readily apparent. This similarity exists both as to the scope of arbitration and as to that language which limits the arbitrator in his authority.

For example, in *American Manufacturing Co.*, the relevant arbitration provisions were spelled out in footnote 1 of that opinion, and the following portion of that footnote is set forth for purposes of comparison:

> "[1] The relevant arbitration provisions read as follows:

> 'Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. • • •
>
> 'The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. Disputes relating to discharges or such matters as might involve a loss of pay for employees may carry an award of back pay in whole or in part as may be determined by the Board of Arbitration.
>
> 'The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. • • •' "

In *Warrior & Gulf Navigation Co.*, the following was said as to the relevant contractual provisions:

> "The collective agreement had both a 'no strike' and a 'no lockout' provision. It also had a grievance procedure which provided in relevant part as follows:
>
> 'Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.
>
> 'Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no

> suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:' "

And, in the instant matter, the following are the comparable contractual provisions:

(Included at p. 137a and p. 147a of the Appendix):

> "(c) *Grievance*
>
> 'Grievance' shall mean disputes or differences between the Company and the Association, or employees represented by it, with respect to the interpretation or application of any provision of this Agreement."
>
> • • •
>
> "The authority of the Arbitrator shall be limited to determining questions involving the interpretation or application of the terms of this Agreement or the applicable Area Agreement. He shall have no authority to add to, subtract from, or to change any of the terms of this Agreement or any Area Agreement, to change an existing wage rate, or to establish a new wage rate." (Par. 8.04)

Clearly the questions presented by the Petitioner are anything but novel. The arguments offered by the Petitioner, though they may be factually dissimilar, involve precisely the same legal issues which were disposed of previously by this Court. The purported concern by the Petitioner as to the effect of the approach taken by this Court and lower Courts upon future collective bargaining is little justification for this Court's reconsideration of issues already settled.

III. The Decision Below Is Clearly Correct.

A. The Argument as to Changing an Existing Wage Rate.

Throughout the life of this dispute, beginning with the initiation of the suit in the District Court and continuing in the Brief currently filed here, the Petitioner had made much of the provision in the labor agreement prohibiting the arbitrator from changing an existing wage rate or establishing a new wage rate. This, it is claimed, would prohibit an arbitrator from rendering a decision in favor of the Association.

The utter absurdity of this argument was clearly indicated by the decision in the Court of Appeals. The effect of the Petitioner's position would be that the Petitioner could, with impunity, tamper with, alter or eliminate any monetary benefit to which the members of the Association were entitled under the Labor Agreement, and then the Association would not be permitted to arbitrate the issue because, in the opinion of the Company, a ruling of the arbitrator to the effect that the Company had violated the Agreement by altering such monetary benefit would not be enforceable because the arbitrator's action to replace the benefit would be an alteration in the then current wage rate.

It is axiomatic that an arbitrator must have the authority to require that the Company refrain from violating its obligations where there is the type of arbitration provision as is present in this Agreement. It is no less axiomatic that this authority must include the right to require that the Company reinstate a wage rate which it had improperly altered, and this in no way can be construed to be an alteration of a wage rate, prohibited by the contract to the arbitrator.

B. The "Arbitration Versus Negotiations" Argument.

It has been suggested in Petitioner's Brief that the result of the decision of the Court of Appeals is that the Association has achieved through the Court that which it could not achieve through labor negotiations.

This is the stock argument which is always presented by a party attempting to avoid the obligation to arbitrate. Each time the parties sit down to negotiate a new labor agreement, there are a multitude of proposals made by both sides. In some cases they relate to new demands—in many others they are merely introduced to clarify the already existing contract. In these latter situations the party presenting the proposal takes the position that the demands which it is pressing are in the nature of clarification of already existing rights. Recognizing that because of ambiguous interpretations of language—or, in some cases, where there is no contractual language but merely an indication of an existing practice—the party making the demand does so in order to more firmly secure the advantage which it believes it has already obtained. In no way is this considered to be an admission that the right does not already exist. Furthermore, this is a practice engaged in by negotiators on both sides of the bargaining table.

The factual inferences which arise from an analysis of past bargaining are obviously important to a determination upon the merits of the controversy. They must be studied with particularity, and give rise to numerous questions, all of which the parties attempt to cover in the *arbitration forum.* This is the forum the parties here have chosen in their labor agreement; this is the forum the courts have found to be appropriate in similar situations; and this is the forum to which the parties have been directed by the Court of Appeals, in line with the prior decisions of this Court.

C. The Argument as to Judicial Inventiveness.

The petitioner has laid great stress upon the failure of the Court of Appeals to utilize "judicial inventiveness" in its deliberations, a phrase which it blithly extracts from the decision of this Court in *Textile Workers v. Lincoln Mills,* 353 U. S. 448, at 457 (1957). On closer scrutiny it is clear that what the petitioner really seeks is a Court that will use

judicial inventiveness to *invent* a method of circumventing the decisions of this Court in *American Manufacturing Co.* and *Warrior & Gulf Navigation Co., supra.*

The Court has rather clearly indicated that unless there is a showing that the parties specifically excluded a controversy from arbitration, when there is a broad arbitration clause in the contract and a claim, which on its face, relates to the interpretation of a provision of a contract, the Court will refrain from deciding the merits of the controversy.

Nonplussed, the Petitioner raises itself by the proverbial boot straps by first presenting its singular version of the factual background and the merits of the basic controversy, and then using the conclusions which it reaches to prove that the matter is procedurally not arbitrable.

Petitioner has clearly misinterpreted this Court's application of "judicial inventiveness" in an attempt to use this terminology as camouflage for its argument which runs directly opposite to the position which has been established by the decisions of this Court. In *Textile Workers v. Lincoln Mills, supra,* this Court explained that the judiciary must fashion a body of the Federal law for the purpose of enforcing labor agreements, and this was followed by the clear mandate in *American Manufacturing Co.* and *Warrior & Gulf Navigation Co., supra.* Petitioner would now have this Court extract from *Lincoln Mills* a blanket of judicial inventiveness with which to smother its later decisions in the *American Manufacturing* and *Warrior & Gulf* cases.

In the world of literature, much use has been made by present-day dramatists of the concept of "the moment of truth". This expression is well applied to the argument which has been offered on behalf of the Petitioner. Superficially read, the argument seems to derive its support from decisions of this Court. But the external appearance is deceiving, and upon closer look, the real truth emerges. In effect, *the Petitioner is asking this Court to reverse its decisions in American Manufacturing and Warrior & Gulf.*

This is the sum and substance of Petitioner's argument. It has chosen itself as the emissary on behalf of all those—

either labor or management—who would refuse to comply with the obligation to arbitrate whenever it might be inconvenient to do so, and is presenting this Petition in the hope that this Court may completely reverse its prior stand on these issues. The inherent danger in this request is manifest. A return to a status where parties can unilaterally refuse to comply with their bargain to arbitrate disputes can only result in chaos.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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